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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1937.

No. 30

UNITED STATES OF AMERICA, ON RELATION OF CHESTER A. WILLOUGHBY, AS TRUSTEE IN BANKRUPTCY OF NATIONAL MECHANICAL SERVICE COMPANY, A CORPORATION, ET AL.,

Petitioners,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

JULIUS MOSES,
LLOYD HETH,
WILLIAM P. SMITH,
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Petitioners,

vs.

SAM HOWARD AND CONTINENTAL CASUALTY COMPANY, A CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing.

Sam Howard and Continental Casualty Company, a corporation, come now and petition this Court for a rehearing of this case, and respectfully show to the Court:

1. This Court by its opinion and decision holds that in spite of the nature of the duties imposed by Section

47(a) of the Bankruptcy Act* upon the trustee in bankruptcy in relation to the custody of bankruptcy estate monies awaiting disbursement or distribution, the duties of the trustee in bankruptcy throughout the period pending such disbursement or distribution are those of a common law fiduciary. Consequently this Court holds that the trustee in bankruptcy, when making or maintaining deposits of such monies in a bank designated under Section

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*Section 47(a) of the Bankruptcy Act, 11 U. S. C. A. 75(a), provides that the trustee in bankruptcy shall:

"(3) Deposit all money received * * * in one of the designated depositories.

"(4) Disburse money only by check or draft on the depositories in which it has been deposited.

"(5) Furnish such information concerning the estates * * * and their administration as may be requested by parties in interest.

"(6) Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts.

"(7) Lay before the final meeting of the creditors detailed statements of the administration of the estates.

"(8) Make final reports and file final accounts with the courts fifteen days before the day fixed for the final meetings of the creditors.

"(10) Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts within the first month after * * * appointment and every two months thereafter, unless otherwise ordered by the courts."

61 of the Act,* is required by virtue of his common law duties to investigate, ascertain, judge and determine, with ordinary care, the stability and solvency of the designated bank. Should there be more than one such designated depository in the district, then his common law duties required him reasonably to investigate, ascertain and judge the stability and solvency of the respective designated depositories; to select with care, the sound depository from the unsound; to determine, with care, whether policy requires a spreading of the funds among several or many of such depositories; and in making all such judgments to determine and take into account facts relating to the nature and amount of the depository bond** of each depository and the aggregate amount of bankruptcy monies currently there maintained on deposit by various or all of the trustees in the district. And, if there be only one designated depository in the district the trustee must continually investigate and judge of its condition, for the court's designation at most assures the deposi-

*Section 61 of the Bankruptcy Act, 11 U. S. C. A. 101 provides:

"Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

**Section 50 of the Bankruptcy Act, 11 U. S. C. A. 78 provides:

"(h) Bonds of * * * designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions."

tory's safety for a limited amount of deposits at the time of designation.

2. The opinion and decision fails to give consideration to the degree to which depository banks become part of the machinery of administration of bankruptcy funds. Just as in many states the office of state or county treasurer as an individual has been abolished and a depositary bank substituted because of its greater administrative efficiency, see for instance, *Miller* v. *Batson,* 160 Miss. 642, 134 So. 567, *Perkins* v. *State,* 130 Miss. 512, 94 So. 460, 463, *Compton* v. *Marengo County Bank,* 203 Ala. 129, 82 So. 159, and *Hasty* v. *Marengo County Bank,* 206 Ala. 280, 89 So. 433, and the depository bank itself regarded as an officer, *State of Kansas* v. *U. S. Fid. & Guar. Co.,* 81 Kan. 660, 106 Pac. 1040, 26 L. R. A. (N. S.) 865; *State* v. *U. S. Fid. & Guar. Co.,* 210 Wis. 178, 246 N. W. 434; *Board of County Comm'rs.* v. *Mason,* 38 Wyo. 1, 264 Pac. 93, so in the bankruptcy system the depository bank is not used as an ordinary bank but as the machinery into which every cent received by a trustee or receiver must go as soon as it is collected and out of which all disbursements must be made.* For this reason banks cannot become depositories

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*General Order in Bankruptcy 29, 11 U. S. C. A. 53 provides that

> "no moneys deposited as required by the act shall be drawn from the depository unless by check or warrant signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn."

Any disbursal made from monies which have not first been placed in the depository is illegal, *In re Hoyt & Mitchell,* 127 Fed. 968 (D. C. N. C.); *In re Kyle,* 181 Fed. 617 (C. C. D. Mass). The depository is liable if it permits a trustee to withdraw funds unless all formalities have been complied with, *In re Hoyt,* 119 Fed. 987, 988; *In re Singer Furniture Corp.,* 47 F. (2d) 780 (D. C. S. D. N. Y.).

unless expressly appointed by court order.* The bankruptcy court prescribes the bond of the depository** and retains supervisory powers over the bank. The court from time to time furnishes the depository the names of the referees or clerks, authorized to countersign checks, General Order in Bankruptcy 29, 11 U. S. C. A. 53. The act does not specify that bankruptcy courts shall choose depositories and bond them with reference solely to their standing as banks; they are to be chosen for the convenience of the trustee in his bankruptcy administration; the bond may properly be fixed having regard to the care with which the depository will police the deposits and withdrawals rather than to insure the funds merely from a bank failure. All these and many other considerations to which a bankruptcy court may resort in designating, supervising or withdrawing designation of a depository must needs be none of the concern of a trustee or receiver. The imposition of a duty

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*Even the district court itself has no authority to order a trustee in bankruptcy to deposit elsewhere than in a designated depository, *Huttig Mfg. Co.* v. *Edwards,* 160 Fed. 619 (C. C. A. 8); *R. J. Reynolds Tobacco Co.* v. *A. B. Jones Co.,* 54 F. (2d) 329 (C. C. A. 8).

**The bond given by the depository usually provides that the depository will "well and truly account for and pay over all monies" now on deposit or hereafter deposited with it and that it will pay only in accordance with the acts of Congress, rules and orders of court, see *In re Singer Furniture Corp.,* 47 F. (2d) 780 (D. C. S. D. N. Y.). The provision of the Bankruptcy Act, Section 50 (h), 11 U. S. C. A. 78 requiring "trustees, referees and designated depositories" to file bonds in the office of the clerk of the court, by referring to designated depositories in the same way as to trustees and referees is one indication of Congressional intent to treat depositories as in the category of trustees and referees and therefore in the nature of officers of the court.

on the trustee or receiver to investigate and judge of depositories will result in muddling up the clear divisions of duties and the checks and balances provided by Congress.

Further, to require a trustee in bankruptcy to judge a depository as a bank, while the bankruptcy court applies additional criteria in its evaluation, creates a hopeless conflict between the trustee and the court. To attempt to mold the duties and liabilities of the trustee or receiver on the assumption he should regard the designated depository in the same way a common law trustee judges the bank with which he deals, is to ignore the Bankruptcy Act and Orders.

3. The opinion and decision of this Court in the instant case is contrary to all existing authority. While many courts, both lower federal courts and the highest courts of more than a dozen states, have passed on the liability of various persons, fiduciaries, officers, quasi-public officers, for the loss of funds deposited in designated depositories, this Court is the first to hold any person depositing money in a depository designated by another pursuant to law to be under a duty to exercise due care in judging of the stability or safety of the depository. In every decided case discovered involving the duties of a person depositing pursuant to mandatory legal obligation in a depository, or in one of several depositories, designated by another acting under legal authority, it was held that the person so depositing would not be liable for mere failure to judge the bank's condition with due care, without regard to whether any statute made provision as to exoneration.

This Court in its opinion, footnote 6, states that some courts have held in the absence of a statutory exculpatory clause, that the mere fact funds were placed in a duly designated depository is not a complete defense, and cites

cases to the effect that if the depositing officer acquires knowledge of facts which show the bank is unsafe, he may be held responsible if he fails to have the funds removed. Each of the cases cited negatives any liability for want of due care; they each hold that where the depositing officer as one of the officers of the depository bank or otherwise actually knows the depository bank is insolvent but fails to remove the funds he is guilty of bad faith and active fraud, which renders him liable. Throughout this Court's opinion the duty to use care in determining and judging of the condition of the depository or depositories is confused with the duty to act when facts revealing a danger to the funds are actually known to the depositing fiduciary or officer. Both logic and authority compel that a distinction be drawn between these two situations. The instant case was decided by the Circuit Court of Appeals on the basis of the rule of law that relieves the depositing fiduciary or officer of any duty to determine and judge of the safety of a depository bank. In reversing the Circuit Court of Appeals and denying the validity of that rule of law this Court has departed from all existing precedents. All of the cases cited by this Court make this distinction clear and support the Circuit Court of Appeals decision.

Thus, in *Independent School District* v. *Flittie,* 54 S. D. 326, 223 N. W. 728, the first case cited by this Court for the proposition that a deposit in a designated depository is not a complete defense, the court deciding that case affirms the rule applied by the Circuit Court of Appeals in the instant case, saying, 223 N. W. 730:

> "If the responsibility of designating and continuing a depository is placed upon some one other than the treasurer, and the duty of the treasurer is to deposit in such depository when designated, the treasurer is

> thereby relieved from the usual duty of exercising care and diligence to keep himself informed and advised from time to time, as a prudent man, as to the continued solvency and financial soundness of the depository."

The next case cited by this Court, *Lane Independent School District* v. *Endahl,* 55 S. D. 73, 224 N. W. 950, arose in the same jurisdiction as the preceding case, re-affirmed the rule there stated, but as in the prior case imposed liability because the depositing officer had been the chief managing officer in the depository bank and had actively used the funds deposited to bolster a bank he clearly knew to be insolvent and beyond saving. In the next case cited, *Cozad* v. *Thompson,* 126 Neb. 79, 252 N. W. 606, the depositing officer was using the funds in question to lengthen the life of the insolvent bank in which he was one of the managing officers, thereby acting in bad faith. In *Zimmerman* v. *Coblentz,* 179 Md. 468, 185 Atl. 342, the depositing officer was president of the insolvent bank in which he continued to deposit funds; in *Jordan* v. *Baker,* 252 Ky. 40, 66 S. W. (2d) 84, the language is merely *dictum,* but again the court does not suggest a duty to exercise due care but merely asserts knowledge of facts might amount to "that degree" of negligence which would render the depositing officer liable.

All the cases decided by the lower federal and other courts in which the question has arisen have carefully drawn the distinction between failure to judge a designated depository bank with due care, and bad faith, *Town of Hamden* v. *American Surety Co. of N. Y.,* 9 Fed. Supp. 733 (D. C. Conn.), where the court concluded (741):

> "That such a treasurer with respect to deposits made in conformity with sec. 512 (creating a depository system) is responsible for losses resulting from

> the failure of the depository only if he acted in bad faith; that in the absence of bad faith he is not responsible." (Words in parenthesis added.)

Board of Education v. *Whisman*, 56 S. D. 472, 229 N. W. 522, 529, 530; *County of Marshall* v. *Bakke*, 182 Minn. 10, 234 N. W. 1; *Seneca Independent School District* v. *Traver*, 63 S. D. 68, 256 N. W. 365, 367; *Holt County* v. *Cronin*, 79 Neb. 424, 112 N. W. 561, 563.

In the District Court the instant case went to the jury solely on the question of whether Sam Howard had violated a supposed duty to investigate, judge and determine with due care the stability of the bank designated as a depository by the bankruptcy court; no question of bad faith was submitted to the jury. It was on this basis that the Circuit Court of Appeals held that the supposed duty to exercise due care as to the designated depository did not in law exist.

It is submitted that this Court has either misapprehended the issues presented by the instant case or has misapprehended the existing precedents. The reasons supporting the precedents are amply explained in respondents' brief, pp. 36-68 and will not be repeated here.

4. The opinion of this Court assumes that the trustee or receiver in bankruptcy has the common law duties of a fiduciary in the care of funds of the bankruptcy estate unless he is relieved of these by agreement, statute or order of court. While this Court has never heretofore been called upon to judge of the exact nature of a trustee or receiver in bankruptcy, on numerous occasions the lower federal courts have dealt with his status and have denied that he was a common law fiduciary, finding him rather a statutory officer of the court, *Imperial Assurance Co.* v. *Livingston*, 49 F. (2) 745, 748 (C. C. A. 8), *United*

States v. *Union Surety & Guaranty Co.*, 118 Fed. 482, 486 (D. C. N. Y.); *Bingaman* v. *Commonwealth Trust Co.*, 1 F. (2d) 505, 506 (D. C. Pa.); *Meehan* v. *King*, 54 F. (2) 761, 763, (C. C. A. 1). This Court has incidentally referred to bankruptcy receivers as officers of the court, *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568. And further, this Court by General Order in Bankruptcy XL, 11 U. S. C. A. 53, has expressly provided that "a receiver * * * appointed by the court to take charge of the property of a bankrupt after the filing of a petition, shall be deemed to be a *mere custodian* within the meaning of section 48 of the Bankruptcy Act, unless his duties and compensation are specifically enlarged by order of this court" (italics added). There was no showing that Sam Howard's duties or compensation as receiver were ever enlarged to make him in his capacity as receiver other than a "mere custodian" under the orders of this Court. By providing that the receiver in bankruptcy shall be merely a custodian, this Court has lulled receivers and their sureties into a false concept of their duties and corresponding liabilities, if it is now to judge their past conduct by the standard of a fiduciary. The receiver is paid only for the performance of duties of custodianship. Should he be now charged, though not paid therefor, with the high responsibilities of a fiduciary? That the trustee's duties in regard to deposits have always been conceived of as identical with that of the receiver, makes it clear neither had a fiduciary obligation as to the stability and safety of the depository bank.

5. However, entirely aside from the fact that trustees and receivers in bankruptcy are purely the creation of the statutes of Congress and the Orders of this Court, the Bankruptcy Act and General Orders contain such minute and detailed provisions for the handling of all money which reaches the hands of a trustee or receiver, that it

is inconsistent with the act and orders to hold the trustee or receiver to be under a duty to determine and judge with due care the condition of depository banks.

Unlike a common law fiduciary, a bankruptcy trustee or receiver cannot carry estate money in his pocket until there is a bill to be paid or a disbursement made nor can he place it in a safety vault nor could he during the period here under consideration deposit the money in a postal savings account. He cannot even deposit it in whatever bank he deems safest. He has only one course—to place the money forthwith upon its receipt in a bank which has been designated by the court as a bankruptcy depository, and which has filed with the clerk of the court a bond as provided in the order of designation. Nor is he free to withdraw funds from a designated depository as he thinks wise. Each depository is furnished by the court the names of the referees or clerks authorized to countersign the checks or warrants drawn by the trustee or receiver, General Order in Bankruptcy 29, 11 U. S. C. A. 53. The trustee or receiver can only withdraw when a referee, clerk or the court directs. The court has the power, without notice to the trustee, to appoint new depositories, increase or decrease the bond of any depository, revoke the designation of any depository. The trustee has no right to be heard in court on his opinion of any depository. The orders designating the depository, revoking it, or otherwise changing its status are made in an *ex parte* proceeding without notice or opportunity to be heard to anyone other than the bank itself. No rules of law limit the court's absolute discretion to create or abolish depositories upon such conditions as the court may choose. When the trustee or receiver receives estate money, he determines from the office of the clerk of court which bank or banks have been properly appointed by the court, qual-

ified as depositories and not had their appointment revoked, and must without more deposit in one such depository. He renders bi-monthly reports to the court as to his disposal of the money, Bankruptcy Act, Section 47(a) (10), 11 U. S. C. A. 75(a) (10). Where, under this system, is there room to imply that the trustee or receiver in bankruptcy must with due care examine and determine the safety and stability of each depository in which he places estate funds? Does not the carefulness with which Congress and Orders of this Court have expressly prescribed the selection and supervision of the depositories of the bankruptcy court, negative any implied duty on the trustee or receiver to exercise the care of the common law fiduciary for whom no bank has been approved by court order?

6. This Court, in refusing to follow the rule established by the cases that under the federal and state depository systems no liability will be imposed on the depositing officer in the event of a loss of funds through a failure of a designated depository for a failure to judge the bank with due care, suggests, as one of its reasons for so holding, that the rule was inapplicable because "the provisions of the Bankruptcy Act concerning the appointment of depositories and the deposits to be made by trustees are of a very different character" from those of the federal and state systems. This Court fails to mention wherein it has found any material differences. Comparison of the provisions of the Bankruptcy Act and General Orders with the federal and state depository systems shows that all the basic relationships created are the same and in many instances even the mechanical details of the state systems are identical with the bankruptcy system. In every one of the more than a dozen jurisdictions from which cases were cited in respondents' brief, pp. 48 to 60, the de-

pository systems were like that in bankruptcy in respect to the following features: (1) the depositing officer was not permitted by law to retain funds received in his official capacity in his possession or to place them where he thought safest; (2) he was required to deposit the funds in some designated depository; (3) the power to select and designate the depository, revoke the designation and approve a new depository, was lodged with a court or officer other than the one charged with the duty of making the deposits. Usually the statutes provide, as in the bankruptcy system, that the designating authority shall fix the amount and terms of the bond to be given by the depository, see *City of Billings* v. *Mass. Bonding & Insurance Co.*, 88 Mont. 91, 290 Pac. 246; *Missoula County* v. *Larson*, 83 Mont. 308, 271 Pac. 710; *Miller* v. *Batson*, 160 Miss. 642, 134 So. 567; Ala. Code Ann. 1928, Supp. 1932, Sec. 317; Fla. Comp. Gen. Laws 1927 Ann., 1934 Supp., Secs. 2404-2405. Similarly, the requirement of countersignatures of other officers in case of disbursements is common, see *Board of Education* v. *Nelson*, 33 N. D. 462, 157 N. W. 664; Ala. Code Ann. 1928, Supp. 1932, Sec. 315; Fla. Comp. Gen. Laws 1927 Ann., 1934 Supp., Sec. 2409. Reports of the amounts on deposit are generally made to the designating authority, see *Town of Hamden* v. *Am. Sur. Co. of N. Y.*, 9 Fed. Supp. 733 (D. C. Conn.); *Rosebud County* v. *Smith*, 92 Mont. 75, 9 Pac. (2d) 1071; Ala. Code Ann. 1928, Supp. 1932, Sec. 897; Fla. Comp. Gen. Laws 1927 Ann., 1934 Supp., Sec. 2410. Just as the deposit of bankruptcy funds creates a mere general claim against the designated depository and not a preferred claim, so in most state depository systems the relation established by the deposit of the depositing officer in the designated depository is that merely of general creditor and debtor, see *In re State Treasurer's Settlement*, 51 Neb. 116, 70 N. W. 532; *City of Parsons* v. *Fid. & Dep. Co.*, 29 F. (2d) 417

(D. C. Kan.) rev'd on other grounds, 43 F. (2d) 315; *Potter* v. *Fid. & Dep. Co.*, 101 Miss. 823, 58 So. 713; *U. S. Fid. & Dep. Co.* v. *Village of Bassfield*, 148 Miss. 109, 114 So. 26; *Board of Education* v. *Nelson*, 33 N. D. 462, 157 N. W. 664; *State* v. *Madison State Bank*, 77 Mont. 498, 251 Pac. 548; *Missoula County* v. *Larson*, 83 Mont. 308, 271 Pac. 710.

This Court states that under the federal depository system the monies deposited are in effect in the treasury of the United States and implies that under state depository systems similar results ensue. Referring to the funds as in the treasury of the state or federal government is merely a manner of describing the conclusion reached when the depositing officer is held not liable for failure to use due care as to the safety of the depository. The money is in fact in the bank, not in the treasury. If the bank fails, most states hold that the state, county, town or other governmental division owning the deposit must take its place as a general creditor of the bank and cannot have a preferred claim, cases cited above. No suggestion has ever been made that the fiction of the money being in the treasury would bar imposition of liability on the depositing officer where as an officer of the depository bank he knew of the bank's insolvent state. Money deposited with a bankruptcy depository is as much on deposit with the bankruptcy court as money deposited with a state or national bank serving as a state depository or a national bank serving as a federal depository is in the state or federal treasury.

7. This Court further points to the fact that bankruptcy funds are private funds whereas in the federal and state depository systems public funds are involved. What legal distinction should arise from this factual distinction is not clear. Bankruptcy funds prior to deposit

are in *custodia legis*. It has been deemed by Congress and this Court that the public interest in the handling of bankruptcy money was sufficient to warrant establishing a depository system therefor identical in all of its essential features with the existing federal and state depository systems. Why should an officer of a bankruptcy court administering funds in *custodia legis* and operating under a depository system be held to a higher degree of duty than a public officer operating under a similar depository system on the theory the former is dealing with private funds, the latter public funds? The usual rule places a higher degree of care upon persons handling public funds than on persons handling private funds, as was stated in one of the cases cited by this Court in its opinion, *Cozad* v. *Thompson*, 126 Neb. 79, 252 N. W. 606, 608. This Court admits that an officer depositing federal funds in a bank designated as a federal depository "is relieved of all responsibility for the stability of the depository." But if the same bank has been designated also as a bankruptcy depository and qualified, this Court holds that a trustee in bankruptcy depositing bankruptcy estate funds therein remains under responsibility for its stability.

8. The decision of this Court is socially undesirable. It emasculates the depository system in its practical result. The designation by the bankruptcy court of a depository becomes meaningless. All of the statutory provisions and orders of court become mere formalities. The courts will become lax in designating and revoking designations of depositories because the duty has been shifted by this Court's decision to the trustee or receiver to determine and judge of any bank's stability. It is the trustee or receiver and his surety who bear the responsibility. The surety of the trustee or receiver becomes a surety, in effect, of the depository bank. The courts will not exercise

their former care in obtaining and examining reports of amounts on deposit, changing bonds, and otherwise regulating depositories. The intent of Congress to have the bankruptcy court responsible for the functioning of the depository system will be defeated. Receivers, paid on the supposition they are mere custodians, will not want to assume the burdens of the office. Nor will trustees. Why should they, from all other federal and state officers, be singled out for more onerous responsibilities? Trustees and receivers in bankruptcy normally perform administrative, not fiscal, duties. If any depository bank fails, the trustee or receiver will be compelled to defend a law suit. Why should he take a risk which the creditors, in receiving his reports, do not?

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, affirmed.

Respectfully submitted,

JULIUS MOSES,
LLOYD HETH,
WILLIAM P. SMITH,
Counsel for Respondents.

WALTER BACHRACH,
R. WEYAND,
Of Counsel.

Certificate of Counsel.

We, Julius Moses, Lloyd Heth and William P. Smith, counsel for the above named Sam Howard and Continental Casualty Company, a corporation, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

JULIUS MOSES,
LLOYD HETH,
WILLIAM P. SMITH,
Counsel for Respondents.

WALTER BACHRACH,
R. WEYAND,
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SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1937.

United States, on relation of Chester A. Willoughby, Trustee, Petitioner, *vs.* Sam Howard et al. | On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 3, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether a trustee (or receiver) in bankruptcy and the surety on his official bond can be held liable for the loss resulting from the insolvency of the bank in which the estate's funds were deposited, if it was one of the depositories designated by the court under U. S. C. Title 11, § 101.

Sam Howard was trustee in bankruptcy of 114 separate bankrupt estates, and was receiver of 9, in the federal court for northern Illinois, Eastern Division. Between August 20, 1930, and June 21, 1932, he had deposited the funds of each of the 123 estates in the Phillip State Bank and Trust Company of Chicago, as ordinary commercial accounts. On the latter date the bank, being insolvent, closed its doors. The aggregate of his bankruptcy deposits in the 123 accounts was, at the time of its closing, over eight times the penalty of the bank's depository bond of $50,000. The only dividend received by the bankruptcy estates was about 11 per cent—which was paid from the amount collected on the depository bond.

As required by U. S. C. Title 11, § 78, Howard had given an official bond to the United States for each estate, and Continental Casualty Company was the surety. The form of the trustee's bond was that prescribed by Form 25 of the General Orders and Forms in Bankruptcy, pursuant to U. S. C. Title 11, § 53.

The obligors bound themselves to pay any loss resulting to the estate from failure by Howard, (a) to obey any order of the court, (b) truly and faithfully to account for all moneys, (c) faithfully

to perform his official duties as trustee.[1] It is agreed that the condition of the bonds given as receiver was in effect the same.

Howard resigned as trustee or receiver of each estate. Chester A. Willoughby, who succeeded him, brought in that court, pursuant to leave, three actions in the name of the United States against Howard and the Casualty Company. In these actions, which were consolidated, recovery was sought on each bond on the ground that its condition had been broken by Howard's failing to perform his official duties as trustee or receiver. The failure assigned was that he negligently deposited the funds, or permitted them to remain, in the Phillip Bank, whereas ordinary care and prudence would have required him to desist from such practice and take care that the aggregate of the deposits of estate funds in that bank should not exceed the penalty of the depository bond. The defendants moved to dismiss the complaints on the ground that they failed to disclose any breach of the condition of the bonds. Upon the denial of the motions, the consolidated cases were heard before a jury on the issue whether Howard had been negligent in the performance of his official duties in so depositing the funds, or in leaving them, in the Phillip Bank.

The following, among other facts, appeared: About twenty Chicago banks had been designated by the court as depositories of bankruptcy funds in that district. Howard, who had for years served as trustee and receiver of bankrupt estates, had, prior to August, 1930, deposited the funds of the estates either in the Central Trust Company of Illinois or the Foreman State National Bank of Chicago. In July he was solicited to transfer his bankruptcy deposits to the Phillip Bank, a small institution. He agreed to do so if the Phillip Bank should become a depository, would make him unsecured personal loans sufficient to discharge his existing personal indebtedness to the Central Trust Company and the Foreman State National Bank—and would give him thereafter like accommodation. The Phillip Bank loaned him $11,000; Howard paid his indebtedness to the other banks; and on August 20, the Phillip Bank qualified as a depository, giving a bond in the sum of $50,000. Within the next

[1] The condition of each bond given as trustee was: "Now, therefore, if the said Sam Howard, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said Bankrupt, which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation to be void; otherwise, to remain in full force and virtue."

few days, Howard opened in the Phillip Bank accounts for bankruptcy estates with deposits aggregating $249,968.15. The number of his accounts, the aggregate amount on deposit, and the amount of his personal loans from that bank increased from time to time. When the bank closed, the accounts numbered 123, the deposits aggregated $416,833.90, and the loans to Howard $17,500. The Phillip Bank's depository bond remained at $50,000. He knew that during this period of deposit there were several heavy runs on the Phillip Bank, its deposits were steadily declining and its resources were being drained.

Defendants' motions for a directed verdict were denied; the jury found for the plaintiff verdicts aggregating $225,740.45; a new trial was refused; and an appeal was taken to the Circuit Court of Appeals, where the case was heard first by two judges, then reargued before the full court. A condensed report of the evidence and other proceedings at the trial occupies 250 pages of the printed record. Much evidence offered by defendants had been excluded; many rulings sought had been refused; and timely exception had been taken to instructions given to the jury and to those refused. Eighty-four assignments of error had been filed with the petition for appeal. But the appellate court examined only a few of the assigned errors. For it held that the trial court should have directed a verdict for the defendants, on the ground that, since Howard had deposited and maintained the funds in one of the banks designated by the court as depositories, he fully performed his official duty in respect to the care of the funds. It reversed the judgment with direction to grant a new trial and to proceed in accordance with the opinion. 87 F. (2d) 243. One judge dissented. We granted certiorari because of the importance of the question presented.

First. That the obligors in the bonds are liable only for breach by Howard of an official duty may be assumed. By the common law[2] every trustee or receiver of an estate has the duty of exercising rea-

[2] *Receiver in Bankruptcy:* In re Curtis, 76 F. (2d) 751, 753 (C. C. A. 2); In re C. M. Piece Dyeing Co., 89 F. (2d) 37, 40 (C. C. A. 2); Hartford Accid. & Indem. Co. *v.* Crow, 83 F. (2d) 386, 388 (C. C. A. 6). *Trustee in Bankruptcy:* In re Reinboth, 157 Fed. 672, 674 (C. C. A. 2); Carson, Pirie, Scott & Co. *v.* Turner, 61 F. (2d) 693, 694 (C. C. A. 6); In re Kuhn Bros., 234 Fed. 277, 281 (C. C. A. 7); In re Newcomb, 32 Fed. 826 (N. D. N. Y.); In re B. A. Montgomery & Son, 17 F. (2d) 404, 406 (N. D. Ohio); compare Delaware *v.* Irving Trust Co., 92 F. (2d) 17, 19 (C. C. A. 2); In re Kane, 161 Fed. 633, 639 (N. D. N. Y.). *Equity Receiver:* Gutterson & Gould *v.* Lebanon Iron & Steel Co., 151 Fed. 72 (C. C. M. D. Pa.); Hitner *v.* Diamond State Steel Co., 207 Fed. 616, 622 (D. Del.). *Trustee:* Barney *v.*

sonable care in the custody of the fiduciary estate unless relieved of such duty by agreement, statute, or order of court. Obviously, Howard was not relieved of the duty by any agreement. The question for decision is whether under the Bankruptcy Act,[3] or any order of the court, this duty in respect to the care of funds was limited to depositing them in one of the depositories designated by the court under U. S. C. Title 11, § 101, so that Howard was relieved of all duty to exercise care in selecting the depository and maintaining funds therein.

Second. No statute relieved Howard of the common law duty to exercise care in the custody of the funds. The only relevant provisions of the Bankruptcy Act prescribing duties of the trustee are:

"Section 61 (U. S. C. Title 11, § 101). *Depositories for Money.* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories."

"Section 47 (U. S. C. Title 11, § 75). *Duties of Trustees.* (a) trustees shall respectively . . .

"(3 deposit all money received . . . in one of the designated depositories;

"(4) disburse money only by check or draft on the depositories in which it has been deposited;

"(5) furnish such information concerning the estates . . . and their administration as may be requested by parties in interest;

. . .

"(7) lay before the final meeting of the creditors detailed statements of the administration of the estates;

"(8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; . . .

"(10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as

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Saunders, 16 How. 535, 545-46; United States Nat. Bank & Trust Co. *v.* Sullivan, 69 F. (2d) 412, 415-16 (C. C. A. 7); Fidelity & Deposit Co. *v.* Redfield, 7 F. (2d) 800, 802 (C. C. A. 9); Johns *v.* Herbert, 2 App. D. C. 485, 497; Caldwell *v.* Hicks, 15 F. Supp. 46, 52 (S. D. Ga.); compare Strauss *v.* United States Fid. & Guar. Co., 63 F. (2d) 174, 176-77 (C. C. A. 4); American Bonding Co. *v.* Richardson, 214 Fed. 897, 901 (C. C. A. 6); Thompson *v.* Hays, 11 F. (2d) 244, 247 (C. C. A. 8). *Executor:* see Taylor *v.* Benham, 5 How. 233, 275; Glasgow *v.* Lipse, 117 U. S. 327, 333-34; Moore *v.* Moore, 47 App. D. C. 18, 27. *Guardian:* Lamar v. Micou, 112 U. S. 452, 465; Corcoran *v.* Kostrometinoff, 164 Fed. 685, 687-88 (C. C. A. 9).

[3] July 1, 1898, c. 541, 30 Stat. 544, as amended; U. S. C. Title 11.

may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; . . ."

Obviously the Act does not in terms relieve the trustee of the common law duty to exercise care in the custody of funds. The designation of banks of deposit proper for bankruptcy funds, like the listing of legal investments for trustees and guardians, limits the discretion which can be exercised by the depositing officer and may render him absolutely liable for the loss of funds placed in a non-designated depository. But the fact that the freedom of choice of the fiduciary is limited by statute does not relieve him of the duty of exercising care and prudence within the field left to his discretion. As he may not shut his eyes to the fact that a so-called legal investment is no longer sound, he may not disregard the fact that a depository proper when designated is no longer safe.[4] The mere imposition of statutory duties does not remove liability for breach of existing common law duties. Compare *Bowerman* v. *Hamner*, 250 U. S. 504, 510-11; *Yates* v. *Jones National Bank*, 206 U. S. 158, 178; *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, 57.

Third. No order of the court limited the common law duty of Howard to exercise care in the custody of estate funds. The Phillip Bank was designated as a depository on its own application. No order directed Howard to deposit funds in the Phillip Bank; and no order specifically authorized him to do so. Being free to select any one or more of the designated depositories, Howard was in respect thereto under the common law obligation to exercise care in the performance of his functions as a fiduciary. While he was making deposits in the Phillip Bank there were about twenty others in the Chicago area which were designated depositories, so he had a wide range from which to choose. By designating the Phillip Bank as a depository the court may have justified Howard in assuming that on August 20, 1930, it was a trustworthy place of deposit for bankruptcy funds to the extent of $50,000. But throughout the period of deposit the legal duty to exercise care remained. If at any time he discovered facts tending to show that the place of deposit was no longer safe, it was his duty to bring the

[4] See Delafield *v.* Barret, 270 N. Y. 43, 48-49; Matter of Flint, 240 App. Div. 217, 225; Matter of Blake, 146 Misc. 780; Matter of Fraser, 150 Misc. 43; Matter of Jacobs, 152 Misc. 139, 141-42; Estate of Allis, 191 Wis. 23, 31-32.

facts to the attention of the court.[5] And at no time was Howard justified in maintaining a deposit not entirely secured by the depository bond if he had reasonable cause to doubt the stability of the bank.

Fourth. The contention that the Bankruptcy Act established a depository system which relieved trustees and receivers wholly of the duty of exercising care as to the condition or stability of a depository rests upon false analogy. For federal public funds Congress has provided a depository system by which the moneys, as soon as deposited are in effect in the Treasury of the United States. 31 U. S. C. §§ 476-78, 495; 12 U. S. C. §§ 391, 392. Under that system an officer who has duly made the deposits is relieved of all responsibility for the stability of the depository. Similar provision has been made in many States for the deposit of public funds of the state or municipality.[6] But the funds of bankruptcy estates are private funds, see *Texas & Pacific Ry.* v. *Pottorff*, 291 U. S. 245, 257, note 11; and the provisions in the Bankruptcy Act concerning the appointment of depositories and the deposits to be made by trustees are of a very different character.

As the exercise of ordinary care in making and maintaining deposits, even if made in a designated depository, was part of Howard's official duties, he and his surety are liable on the bonds if he failed in this respect. On that issue the evidence—particularly in view of the personal loans to him—was ample to justify submitting the question to the jury. The judgment of the Circuit Court of Appeals is, therefore, reversed; and the cause is remanded to it for consideration of the other errors which the defendants assigned concerning the conduct of the trial.

Reversed.

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[5] Compare Jordon v. Baker, 252 Ky. 40, 49; Zimmerman v. Coblentz, 179 Md. 468, 476.

[6] In a number of States statutes specifically relieve public officers of liability if the funds entrusted to them are deposited in the manner provided by law. Some courts hold that in the absence of such a provision the mere fact that the funds are placed in a duly designated depository is not a complete defense; and that if the officer acquires knowledge of facts which show the bank to be unsafe, he may be held responsible if he fails to have the funds removed. Independent School Dist. v. Flitty, 54 S. D. 526; Lane Independent School Dist. v. Endahl, 55 S. D. 73; Cozad v. Thompson, 126 Neb. 79; see Jordan v. Baker, 252 Ky. 40, 49.